

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN  
AT JODHPUR.

**ORDER**

S.B. Civil Writ petition No.1978/1996

Dr. Prithvi Raj Agarwal Vs. State of Rajasthan

Date of Order : 01/02/2005

**HON'BLE MR.JUSTICE RAJESH BALIA**

Mr. R.S. Saluja, for the petitioner.  
Mr. B.L. Bhati, for the respondents.

Heard learned counsel for the parties.

The petitioner was appointed as CAS on 13.5.1969. While enquiry was pending against the petitioner on the alleged absence from duty without leave since 19.11.1979, the petitioner applied for voluntarily retirement on 13.7.1992 with immediate effect.

The request of the petitioner for voluntarily retirement was accepted with effect from 13.10.1992 vide communication dated 4.9.1992 by treating the application as filed within a period of notice for three months requisite under rules for the purpose for seeking voluntarily retirement. The order dated 4.9.1992 was duly communicated to the petitioner

and order of voluntarily retirement became effective with effect from 13.10.1992. These facts are not in dispute.

Subsequent thereto by order dated 5.8.1994, the State Government cancelled the order dated 4.9.1992. On the alleged date from which the petitioner remained absent, the petitioner has neither attained the age of 45 years nor completed the services of 20 years in State service, therefore, the RPSC has recommended for withdrawal of consent accorded for voluntarily retirement. Consequently, the sanction was withdrawn by order dated 5.8.1994 and subsequently by order dated 19-12-1995, on the basis of the enquiry that was pending at the time of voluntarily retirement the petitioner was ordered to be removed from service. This order is subject matter of challenge in the writ petition on the ground that once voluntarily retirement of the petitioner became effective under the rules governing voluntarily retirement, the order of punishment and withdrawing the sanction of voluntarily retirement is not permissible in law and, therefore, no removal can take place of the petitioner who already stood voluntarily retired from service on 13.10.1992.

The respondents in their reply have stated the reasons given for revoking the voluntarily retirement sanctioned

vide order Annexure-16 dated 5.8.1994 and order of punishment dated 19.12.1995 Annexure-18.

It may be noticed that the application for voluntarily retirement was moved by the petitioner on 13.7.1992 when an enquiry was continuing against the petitioner treating him to be still in service, for allegedly remaining absent from duty. Reference to 19.11.1979 has been made as a date on which the petitioner should have fulfilled the condition of voluntarily retirement for making application has been made.

The petitioner had undoubtedly completed 45 years of age as on the date he made an application seeking voluntary retirement is not in dispute. It may be noticed that attaining 45 years age or completion of 20 years service is an alternative and not cumulative.

It is the date from which voluntary retirement is sought which is relevant for the eligibility and not the date on which according to respondents, petitioner has absented himself from duty. The basic premise on which order dated 5.8.1994 proceeded was erroneous on the face of it, apart from the fact that once the order of retirement became effective, there was no reason for withdrawing the sanction accorded to petitioner for

retiring from service which has already become effective. The petitioner who was not in service since 13.10.1992, obviously could not have been removed from service on 19.11.1995 by ignoring that fact.

In support of the aforesaid, the learned counsel for the petitioner referred to three decisions of Hon'ble Supreme Court.

In the case of Dinesh Chandra Sangma Vs. State of Assam & Ors. reported in (1977)4 SCC 441, the Hon'ble Supreme Court has held that the appellant, a member of the Judicial Service, after attaining the age of 50 years served a notice on the Government under FR 56(c) that he proposed to voluntarily retire from service with effect from August 2, 1976. Permission was accorded by State Government and agreed to by the High Court. On July 28, 1976, the State Government countermanded its sanction and gave the petitioner posting which was not responded to by the petitioner. Consequently, the petitioner was removed from service by way of disciplinary proceedings. The writ petition filed by the petitioner against withdrawal of permission of voluntarily retirement and threatening him of disciplinary proceedings for not joining the place of posting, was disallowed by the High Court.

The Supreme Court reverse the judgment of the High Court and said that :-

"FR 56 is one of the statutory rules which binds the Government as well as the Government servant. The condition of service which is envisaged in Rule 56(c) gives an option in absolute terms to a Government servant to voluntarily retire with three months' previous notice, after he reaches 45 years of age or has completed 20 years of service, cannot therefore be equated with a contract of employment as envisaged in Explanation 2 to Rule 119."

The appellant has voluntarily retired by three months' notice, not in accordance with express or implied term of his contract of employment, but in pursuance of statutory rule.

The High Court committed an error of law in holding that consent of the Government was necessary to give legal effect to a voluntary retirement of the appellant under FR 56(c). Since the conditions of that rule are fulfilled in the instant case, the appellant must be held to have lawfully retired as notified by him with effect from August 2, 1976.

In this view of the matter, the subsequent order of July 28, 1978 revoking the permission are ineffectual in law and are therefore null and void."

Consequently, giving him the posting orders by the High Court were also held to be unlawful.

Another case referred by the learned counsel for the petitioner is B.J. Shelat Vs. State of Gujarat & Ors. reported in (1978)2 SCC 202. The case arose under the Bombay Civil Service Rules, 161 (2)(ii) proviso and Fundamental Rules 56(k) proviso (b). Rule 161 in respect of voluntarily retirement is per materia with Rule 244(i) of RSR as was provided at the time when the petitioner has applied for voluntary retirement which permitted the Government to withhold the permission to retire a Government servant

- (i) who is under suspension or
- (ii) against whom departmental proceedings are pending or contemplated or
- (iii) against whom a prosecution is contemplated or may have been launched in a court of law.

In the case before the Hon'ble Supreme Court, the enquiry was contemplated against the official when the request for voluntarily retirement was made in Nov. 1970. He made a subsequent application also on 17.7.1973 intimating his intents to retire w.e.f. 3.12.1973 on completion of 55 years of age. No action was taken on this application, instead an explanation was called to explain certain allegations of bribery. On December 11, 1973 he was suspended and enquiry was ordered which led to

order of dismissal of the petitioner.

The appellant filed a writ petition challenging the jurisdiction of the Government to take disciplinary action against him after retirement. This petition was dismissed by the High Court and a Letters Patent Appeal filed by the appellant was also dismissed.

The appellant filed a special leave petition in the Supreme Court against the order of dismissal of his writ petition by the High Court. By that time, the petition had been dismissed. The Court allowed the appellant to withdraw his petition reserving his right to agitate the question as to whether disciplinary action can be taken against him after retirement when final orders were passed in the disciplinary inquiry against him.

When the petition was filed challenging dismissal order, it was contended by the State on the premise of the proviso (ii) to Rule 161 which envisaged that it shall be open to the appointing authority to withhold permission to retire a Government servant who is under suspension, or against whom departmental proceedings are pending or contemplated, and who seeks to retire under this sub-clause goes to show that a

Government servant cannot retire without specific permission of the appointing authority and as in this case no permission was granted, it should be held that the appointing authority withheld permission to the Government servant to retire according to the proviso. It is incumbent on the appointing authority to withhold permission to retire on one of the conditions mentioned in the proviso. High Court upheld such intends and dismissed the petition. On appeal, the Supreme Court reversed the judgment of High Court and said:-

"We are of the opinion that the proviso contemplates a positive action by the appointing authority. The words " It shall be open to the appointing authority to withhold permission" would indicate that the appointing authority has got an option to withhold permission and that could be exercised by communicating its intention to withhold permission to the Government servant. The appointing authority may have considered the question and might not have taken a decision either way or after considering the facts of the case might have come to the conclusion that it is better to allow the Government servant to retire than take any action against him. For the proviso to become operative, it is necessary that the Government should not only take a decision but communicate it to the Government servant."

It may be noticed that it is not the letter of law that in case enquiry is pending or any of contingency envisaged under

proviso to Rule 244 exist, the incumbent cannot be allowed to voluntarily retire in terms of Rule 244. It remains within the domain of option of the appointing authority. Option to withhold permission to retire in order to be effective need a positive act of exercise of such option to withhold permission and its communication to incumbent before the notice of voluntary retirement becomes effective.

Lastly, attention has been invited to a decision of the Supreme Court in Union of India & Ors. Vs. Sayed Muzaffar Mir reported in 1995 Supp(1) SCC 76 wherein period of notice for voluntarily retirement had expired on 22.10.1985 but no communication was made under proviso to Rule 1802(b)(1) of withdrawing the permission to voluntarily retire or under Rule 1801(d) retaining the railway servant in service, therefore, the order became effective with effect from 22.10.1985 and the incumbent retired in pursuance thereof. Considering the provision, it was stated by the Court:-

“There are two answers to this submission. The first is that both the provisions relied upon by the learned counsel would require, according to us, passing of appropriate order, when the Government servant is under suspension (as was the respondent), either of withholding permission to retire or retaining of the incumbent in service.

It is an admitted fact that no such order had been passed in the present case. So, despite the right given to the appropriate/competent authority in this regard, the same is of no avail in the present case as the right had not come to be exercised."

In view of the aforesaid discussion, it is clearly laid down that once voluntarily retirement becomes effective whether by efflux of period of notice or by not exercising of option during the period of notice for withdrawing or retaining the service of the incumbent, where such option rest with the appointing authority or in case such option is not communicated by the competent authority, the voluntarily retirement takes effect from the expiry of period of notice and thereafter it is not permissible for the competent authority to proceed with the enquiry and punish him with the removal order.

In this case, the Government having positively decided to sanction the request of voluntarily retirement made by the petitioner and it became duly effective with effect from 13.10.1993 thereafter it is not open for the appointing authority to fall back on provision for withholding the permission to retire by cancelling the permission accorded and thereafter to proceed with enquiry and removing him from service.

Consequently, the petition is allowed. The impugned orders Annexure-16 and Annexure-18 are held to be ineffectual and null and void and are quashed. The petitioner shall be entitled to all benefits flowing from his retirement w.e.f. 13.10.1992

There shall be no order as to costs.

**[Rajesh Balia],J.**

**Pd.**